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No. 99-1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

RENEE LOWERY, *et al.*,

Petitioners,

v.

CIRCUIT CITY STORES, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Circuit City misstates both the nature of this case and the issues presented for review. The unanimous jury verdict finding Circuit City guilty of a pattern or practice of intentional race discrimination in promotions refutes the Company's tendentious argument that the case involved only isolated, individual claims of discrimination. The district court likewise found that the "totality" of Circuit City's excessively subjective promotion practices had a significant disparate impact on African Americans at headquarters. (C.A. App. 707)[1] The court of appeals rejected Circuit City's argument that the jury's pattern or practice finding was not based on substantial evidence. Indeed, in *Lowery II*, the court found that such evidence supported a finding, for purposes of punitive damages, that Circuit City had not made good faith efforts to comply with the antidiscrimination laws. (Pet. App. 21a-23a)

Nor is there any mystery about the nature of Circuit City's discrimination. Plaintiffs alleged and proved that Circuit City's all-white senior management, who openly expressed disdain for the abilities and qualifications of African Americans, implemented and maintained a system of excessively subjective procedures that prevented black employees from being promoted to management or supervisory positions at headquarters. This Court and others

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[1] Circuit City selectively quotes from the district court's disparate impact decision to suggest that plaintiffs had failed to demonstrate a pattern or practice of discrimination. Brief in Opposition ("Opp.") at 7. In fact, the court agreed with the jury that plaintiffs had demonstrated a "significant statistical disparity" in promotion rates of whites and blacks to management positions. (C.A. App. 706) The court concluded, however, that it could not "point to a specific portion of Circuit City's subjective promotion practices which causes a disparate impact on African Americans at Headquarters. It is the totality of the promotion practice which is problematic. That is why this case is most appropriately decided by the jury under the disparate treatment theory." (*Id.* at 707)

have frequently recognized that such excessively subjective personnel practices can serve as the basis for classwide liability under the antidiscrimination laws. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Green v. USX Corp.*, 843 F.2d 1511, 1533 (3d Cir. 1988); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983).

Circuit City's proven pattern or practice of discrimination confirms the propriety of the trial court's determination that this case satisfied the requirements of Rule 23(a) and 23(b)(2): the Company demonstrably "acted on grounds generally applicable to the class" of African American headquarters employees, "thereby making appropriate final injunctive relief" with respect to the class. Thus, the class certification question here is not, as Circuit City suggests, whether every case alleging a pattern or practice of discrimination is entitled to class treatment, or whether trial courts have discretion in making class certification decisions. Rather, the question presented, which transcends the facts of this case, is whether a class that the trial court has expressly and properly found to meet the requirements of Rule 23(a) and 23(b)(2) can nonetheless be decertified (or not certified at all) because of case management considerations applicable only to Rule 23(b)(3) classes. The Fourth Circuit's adoption of that approach violates this Court's admonition in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), against "judicial inventiveness" in the application of Rule 23 as written. Moreover, the court of appeals' clear error of law, if not corrected, will seriously hamper the ability of victims of systemic employment discrimination to enforce the expanded damage remedies under the Civil Rights Act of 1991. That important issue warrants this Court's plenary review.

The Fourth Circuit compounded its error, and the impact on private enforcement of the civil rights laws, by ruling that

the absence of a certified class precluded the district court from granting any relief to remedy the pattern or practice of discrimination found by the jury. Circuit City is wrong in claiming that the court of appeals merely modified an overbroad injunction that was unsupported by the particular facts. The Fourth Circuit vacated *all* aspects of the injunction relating to the pattern or practice of discrimination found by the jury, based on its holding that the district court could not grant "class-wide" injunctive relief. (Pet. App. 68a-69a) The court therefore refused to permit any remedy for Circuit City's proven pattern or practice of discrimination simply because the class was decertified for procedural reasons unrelated to the class-wide nature of the claims made or the relief requested. The court of appeals adhered to that position even after concluding in *Lowery II* that punitive damages were appropriate in view of Circuit City's failure to make good faith efforts to comply with the antidiscrimination laws. That result cannot be squared with this Court's long line of decisions that a district court has the broad power, and indeed the duty, to eradicate class-wide discriminatory practices that affect individuals other than the particular named plaintiffs. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 474 (1986). Review is necessary to ensure that district courts retain the power to remedy a proven pattern or practice of discrimination whether such discrimination is proved in an individual case or a class action.[2]

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[2] There is no basis for Circuit City's argument that this Court's grant of the prior petition in No. 98-972 is "tantamount to a denial of certiorari" on the two questions presented here. Opp. at 10 n.2. Because the prior petition also presented the same question regarding the standard for assessing punitive damages that this Court decided in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), and because the decision in *Lowery I* was so clearly contrary to the holding in *Kolstad*, it was not necessary for the Court to consider the other questions presented in No. 98-972 when it vacated *Lowery I* and remanded for further consideration in light of *Kolstad*. In *Lowery II*, the Fourth Circuit corrected its prior opinion on the issue of punitive damages but otherwise reaffirmed *Lowery I* in all

ARGUMENT

1. Circuit City attempts to avoid review of the class certification issues by portraying the Fourth Circuit's decision as a fact-based determination with no broad implications for enforcement of the civil rights laws. Opp. at 11-13. In fact, this case was based on an erroneous legal ruling that squarely presents a significant legal issue — whether the class action remains a viable procedural tool to remedy pervasive discrimination in the workplace. The district court exercised its discretion to certify the class, and the propriety of that ruling was confirmed by the pattern or practice verdict. But the district court then committed legal error by decertifying the class in a misguided attempt to deal with case management concerns. Circuit City suggests that the class was decertified here only because *this particular class* was unusually "cumbersome and inefficient." Opp. at 12.[3] The same management and efficiency issues, however, will arise in every case where employees exercise their right under the Civil Rights Act of 1991 to have a jury decide their individual claims for compensatory and punitive damages as well as their classwide claims for injunctive relief. In every such case, the same problems will arise as to the proper procedures for trying the common pattern or practice and injunctive issues as well as the individual damage claims. These issues are not unique to the present case.

Circuit City asserts that the Fifth Circuit's split decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.

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substantive respects. (Pet. App 5a) Accordingly, the questions relating to class certification and injunctive relief remain to be decided.

[3] Circuit City cites *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), for the proposition that cumbersome and inefficient class actions should not be certified. Opp. at 11, 16. *Reiter* actually addressed the power of the district courts to weed out frivolous antitrust class actions. 442 U.S. at 345, 346 (Rehnquist, J., concurring). It says nothing about the proper management of meritorious employment discrimination class actions with individual damage claims.

1998), and the Seventh Circuit's recent decisions in *Lemon v. International Union of Operating Engineers*, ___ F.3d ___, No. 99-4101, 2000 WL 733577 (7th Cir. June 9, 2000) and *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999) provide support for the Fourth Circuit's class action ruling in this case. Opp. at 14-15.[4] On the contrary, these decisions confirm both the importance of the question presented and the need for this Court's guidance. All of the cases reflect the lower courts' struggle to reconcile the expanded remedies authorized by the 1991 Civil Rights Act with the requirements of Rule 23.

In *Allison*, the panel majority held that the presence of individual damage claims in a case would preclude class certification under either Rule 23(b)(2) or 23(b)(3). 151 F.3d at 425. In denying a petition for rehearing, however, the court indicated that it had simply concluded that the trial court had not abused its discretion in denying class certification in the particular case. *Id.* at 434. If given broader application, the decision in *Allison*, like the decision below, would effectively thwart enforcement of the civil rights laws by precluding class actions whenever individual employees seek damages as well as class-wide injunctive relief.

In *Lemon* and *Jefferson*, the Seventh Circuit held that the presence of individual damage claims requires that class members receive notice and an opportunity to opt out of the class action, thereby precluding a "pure" Rule 23(b)(2) non-opt out class. *Lemon*, 2000 WL 733577, at *2-3; *Jefferson*, 195 F.3d at 897. Unlike the Fifth Circuit, however, the Seventh Circuit concluded that there were three potential

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[4] Circuit City also cites *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). That case, however, is substantially different in that it deals with discrimination in accommodations, rather than employment, and did not involve either a common pattern or practice of the sort found to exist here or the manageability concerns arising out of combining a class-wide injunctive action with individual class members' claims for compensatory and punitive damages.

options for certifying a class in such circumstances: (1) certification under Rule 23(b)(3) for both the class-wide and individual claims; (2) split certification, in which the claims for equitable relief would be certified under Rule 23(b)(2) and the damage claims would be certified under Rule 23(b)(3) and tried first; and (3) certification under Rule 23(b)(2) for all purposes, but with notice and opt out rights granted by the court pursuant to its authority under Rules 23(d)(2) and 23(d)(5). *Lemon*, 2000 WL 733577, at *3-4; *Jefferson*, 195 F.3d at 897-98.

The Seventh Circuit's decisions demonstrate that Rule 23, as written, gives the courts sufficient flexibility to certify pattern or practice class actions seeking both systemic injunctive relief and compensatory and punitive damages for individual class members. Neither the Seventh nor the Fifth Circuit, however, endorsed the approach adopted by the Fourth Circuit here, which was to conflate the separate requirements of Rule 23(b)(2) and 23(b)(3) in order to deny certification of an otherwise proper class. Despite the court's disclaimer, it is quite clear from footnote 5 of the court's opinion in *Lowery I* (Pet. App. 52a) that the district courts in the Fourth Circuit are now authorized to consider manageability and superiority in certifying and decertifying a 23(b)(2) class action. That result clearly is contrary to *Amchem*, which requires the courts to apply Rule 23 as written. Moreover, the court of appeals itself acknowledged that it was weighing in on one side of a split in the circuits, citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993), as a conflicting authority. (Pet. App. 51a) The court even quoted the portion of the *Forbush* opinion in which the Fifth Circuit held that "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions." (*Id.*) This, of course, is just the opposite of the Fourth Circuit's holding in the present case.[5]

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[5] Circuit City argues that the Fifth Circuit resolved the *Forbush* conflict in its later *Allison* opinion. Opp. at 17 n.5. In fact, the Fifth

Thus, review by this Court is necessary to resolve the discord among the circuits, confirm the principles of *Amchem* with respect to Rule 23(b)(2) and clarify the confusion that has arisen about the proper manner of certifying class actions under the 1991 Civil Rights Act. This case is an unusually good candidate for such a review because it presents the class certification issues so clearly and concretely. The issues are presented *clearly* because the district court held that the class action met all of the requirements of Rule 23 and was decertified *only* because the court could not devise what it considered a fair and efficient means of trying the class members' individual claims for compensatory and punitive damages. (Pet. App. 94a) The case therefore squarely raises the issue of how to deal with individual damage claims in an otherwise proper pattern or practice class action. The issues are presented *concretely* because, despite the decertification order, the case was tried in essence as a liability-stage class action and resulted in specific jury determinations that Circuit City did engage in a pattern or practice of intentional discrimination and that certain of the petitioners were entitled to recover compensatory and punitive damages. Therefore, unlike the decisions in *Allison*, *Lemon* and *Jefferson*, which arose on interlocutory appeals from initial class certification decisions, this case provides a robust factual and legal framework in which to decide how pattern or practice class actions may be tried when they involve individual damage claims in addition to systemic injunctive relief.

2. Circuit City argues that the injunction entered by the district court was not necessary to remedy "three isolated instances of discrimination." Opp. at 20. The argument misses the point because the injunction was intended to remedy the pervasive pattern or practice of intentional discrimination that had been found to exist throughout Circuit

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Circuit in *Allison* actually adhered to and reinforced *Forbush*. *See* 151 F.3d at 414 n.8. In any event, the decision below is also in conflict with several other circuit court decisions, which are listed in Circuit City's brief. Opp. at 17 n.6. The split in the circuits on this issue is undeniable.

City's headquarters. The Fourth Circuit's conclusion that, as a matter of law, the decertification of the class for management reasons precluded entry of injunctive relief to eliminate proven systemic discrimination is neither legally nor logically supportable, and exacerbates the harm caused by its ruling on class certification.

Contrary to Circuit City's argument (Opp. at 21-22), there is ample legal authority supporting the district court's injunctive decree. In similar circumstances, other courts have entered comparable systemic injunctions. Indeed, the injunction here was based in large part on those portions of the decree affirmed by the Fourth Circuit in *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 643-52 (4th Cir. 1978). *See also Sheet Metal Workers*, 478 U.S. at 481-82 (court-appointed administrator with broad powers to supervise union's compliance); *Thomas v. Washington County School Bd.*, 915 F.2d 922, 926 (4th Cir. 1990) (publicly advertised selection process); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 146-47 (4th Cir. 1984) (posting notices of job opportunities, survey of black employees' job interests, detailed job descriptions, periodic reports of compliance), *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 498-99 (4th Cir. 1981) (development of objective promotion criteria and creation of new EEO Employee Complaints Representative position). *See generally* 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1744-68 (3d ed. 1996). In short, the injunction entered in this case is not an aberration, but rather is typical of injunctions generally used to eliminate systemic discrimination. What is aberrational is the court of appeals' refusal to allow the district court to remedy such systemic discrimination.[6]

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[6] It is clear that the Fourth Circuit rendered the district court powerless to impose any remedy for Circuit City's discriminatory promotion practices. If the court of appeals had simply been concerned with the overbreadth of certain of the provisions of the injunction, as Circuit City contends (Opp. at 20), it would have remanded the matter to

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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the district court to enter an injunction more narrowly tailored to remedy the pattern or practice found by the jury. Instead, the court vacated, without remand, the entire injunction other than the provisions relating to Lowery, based on its conclusion that the district court could not impose *any* "class-wide" injunctive relief in the absence of a certified class action. (Pet. App. 68a)